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Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

FIRST PENN-PACIFIC LIFE INSURANCE COMPANY,
Petitioner,

v.

WILLIAM R. EVANS, CHARTERED;
MARYLAND FIRST FINANCIAL SERVICES CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the unprecedented application of the *Burford* abstention doctrine in a routine action for rescission of an insurance policy is consistent with the purposes and scope of the doctrine.

RULE 29.6 STATEMENT

The Lincoln National Life Insurance Company and Lincoln National Corporation are, respectively, the parent and grandparent corporations of petitioner, First Penn-Pacific Life Insurance Company. Lincoln National Corporation is the only publicly held company that owns ten percent or more of petitioner's stock.

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First Penn-Pacific Life Insurance Company ("First Penn-Pacific") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of a three-judge panel of the court of appeals (App., *infra*, 1a-16a) is reported at 304 F.3d 345 (4th Cir. 2002). The opinion of the district court (App., *infra*, 17a-31a) is reported at 162 F. Supp. 2d 423 (D. Md. 2001).

JURISDICTION

A panel of the court of appeals entered judgment on September 18, 2002. A petition for rehearing and rehearing *en banc* was denied on October 3, 2002. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1332 (a) (1) of Title twenty-eight of the United States Code provides:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between ... citizens of different states....

STATEMENT OF THE CASE

First Penn-Pacific filed a complaint in the district court against William R. Evans, Chartered ("Evans") seeking rescission of an insurance policy issued to Stanley R. Moore

and a declaration that the policy is void *ab initio*. Maryland First Financial Services Corporation ("Maryland First Financial") intervened in the action and thereafter moved to dismiss based on *inter alia* the abstention doctrine recognized in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The district court granted the motion to dismiss, holding that *Burford* abstention was warranted. The Fourth Circuit affirmed.

A. Factual Background

In January 1998, Petitioner, First Penn-Pacific, issued a life insurance policy with a face value of $2,000,000 to Mr. Moore. App., *infra*, 3a-4a. Shortly thereafter, Mr. Moore assigned his interest in the policy to Answer Care, Inc., a company engaged in the promotion and consummation of "viatical settlements."[1] App., *infra*, 2a-3a. Evans served as escrow agent for Answer Care. App., *infra*, 3a. Evans owned bank accounts holding the funds of Answer Care's investors and the policies Answer Care purchased with those funds. App., *infra*, 3a. After receiving notice of Mr. Moore's transfer of interest, First Penn-Pacific learned that Mr. Moore fraudulently misrepresented certain material facts when he applied for the policy. App., *infra*, 3a.

In an action initiated by the Maryland Securities Commissioner, the Circuit Court for Baltimore City placed

[1] A viatical settlement is "an investment contract pursuant to which an investor acquires[, at a discount,] an interest in the life insurance policy of a terminally ill person." *See SEC v. Life Partners, Inc.* 87 F.3d 536, 537 (D.C. Cir. 1996). The discount depends on the insured's life expectancy. *See id.* The investor's profit from the transaction is the difference between the discounted purchase price paid to the insured and the policy benefits paid upon the insured's death, less transaction costs, premiums paid, and other administrative expenses. *See id.*

Answer Care into receivership after concluding that it fraudulently sold viatical settlements to investors. App., *infra*, 3a-4a, 19a. The state court appointed Maryland First Financial as Answer Care's receiver and charged Maryland First Financial with responsibility for marshalling and managing Answer Care's assets for distribution to Answer Care's defrauded investors. App., *infra*, 4a, 19a.

B. Procedural History

First Penn-Pacific filed a complaint against Evans in the United States District Court for the District of Maryland, seeking rescission of the policy issued to Mr. Moore and a declaration that the policy is void *ab initio* based on the material misrepresentations in the application for the policy and the lack of an insurable interest. App., *infra*, 3a. Jurisdiction arose under 28 U.S.C. § 1332 (a) (1). Maryland First Financial intervened in the action, claiming that the policy was an asset of the receivership estate. App., *infra*, 2a, 17a-18a. Maryland First Financial then moved to dismiss on the ground that abstention under *Burford* was necessary to avoid interference with the receivership proceedings. App., *infra*, 2a, 4a, 19a-20a. On September 17, 2001, the district court dismissed the case, in reliance on *Burford*. App., *infra*, 5a, 21a-29a, 33a.

The district court found that the receivership proceeding was a "highly regulated state process" and that the liquidation and distribution of Answer Care's assets was "'a matter of substantial public concern.'" App., *infra*, 23a (citation omitted). The district court then concluded that abstention was appropriate to avoid disruption of the State of Maryland's efforts to provide a unified method for Answer Care's liquidation. App., *infra*, 24a. According to the district court, the State of Maryland had a greater interest

than the court in adjudicating the dispute because *inter alia* the receivership proceeding was being administered pursuant to the Maryland Securities Act and Maryland's procedural rules for receiverships. App., *infra*, 24a. The district court further found that continuation of the action in federal court would "infringe upon certain orders entered by the state court and complicate" Answer Care's liquidation. App., *infra*, 25a. Finally, the district court stated that it was "satisfied" abstention was appropriate because of "'conflicts in the interpretation of state law ... [that were] almost certain to result'" from the court's intervention. App., *infra*, 28a (citation omitted).

On September 18, 2002, a divided panel of the Court of Appeals for the Fourth Circuit affirmed the district court's decision. App., *infra*, 12a. The panel agreed with the district court's finding that Answer Care was subject to a highly regulated state process involving the liquidation of its assets. App., *infra*, 7a. The panel then held that the district court "reasonably viewed" Maryland's receivership process as "'a matter of substantial public concern.'" App., *infra*, 8a (citation omitted). The panel also believed that allowing the federal action to proceed "would severely complicate the efficient dissolution" of Answer Care's estate. App., *infra*, 9a. The panel found that the district court "permissibly concluded" that continuing the action in federal court "would infringe upon" orders entered by the state court. App., *infra*, 10a. The panel also determined that the fact that state law controlled the dispute in this case and that state law governed the receivership proceedings counseled against the exercise of federal jurisdiction. App., *infra*, 12a.

The dissent found that abstention was unsupported by the facts and that the panel's decision fundamentally departed from the proper scope of the *Burford* doctrine. App., *infra*,

13a-16a (Luttig, J., dissenting). According to the dissent, the decision "all but completed [the] transformation of *Burford*'s exception to decision into an exception to abstention, in open departure from [the] 'virtually unflagging obligation ... to exercise the jurisdiction' conferred ... by Congress." App., *infra*, 16a (Luttig, J., dissenting) (citation omitted).

REASONS FOR GRANTING THE WRIT

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), this Court articulated a narrow circumstance in which a federal court should decline to exercise its properly invoked jurisdiction. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976) (stating that abstention is an "extraordinary and narrow exception" to the federal courts' "virtually unflagging" obligation to exercise the jurisdiction conferred by Congress).[2] The Court refined *Burford* abstention in *New Orleans Public Service, Inc. v. Council of New Orleans* ("*NOPSI*"), 491 U.S. 350 (1989). The Fourth Circuit's decision in this case charts a new course

[2] *See also New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."); *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893) ("'[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.'") (citations omitted); *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909) ("When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction .... The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.") (citations omitted)).

in the area of abstention, *see First Penn-Pac. Life Ins. Co. v. William R. Evans, Cht'd*, 304 F.3d 345, 351 (4th Cir. 2002) (Luttig, J., dissenting), and reveals a "substantive change in the law of abstention from a doctrine of exception to a doctrine of rule," *see Johnson v. Collins Entm't. Co.*, 199 F.3d 710, 730 (4th Cir. 1999) (Luttig, J., concurring in judgment) (cited in *First Penn-Pac.*, 304 F.3d at 353 (Luttig, J., dissenting)).

Because a federal court's authority to abstain exists only insofar as permitted by this Court, this Court alone can determine whether a federal court has exceeded the specific parameters of an abstention doctrine. *See, e.g.*, *Quackenbush v. Allstate*, 517 U.S. 706, 731 (1996) (resolving the question whether *Burford* abstention was limited to actions seeking "equitable or otherwise discretionary" relief). This Court should decide whether the Fourth Circuit's new course is consistent with the federal courts' "strict duty" to exercise their jurisdiction. *See id.* at 716. This Court also should address the conflict between the Fourth Circuit's decision and the decisions of other courts of appeals concerning *NOPSI*'s application in similar cases and the appropriate standard of review of abstention decisions.

Burford v. Sun Oil Co., *supra*, arose from a district court's order dismissing a challenge to the validity of an oil drilling permit granted by the Texas Railroad Commission, an entity charged with primary regulatory authority regarding the oil industry in the State of Texas. *See Burford*, 319 U.S. at 316-17, 320. Addressing the propriety of dismissal, this Court recognized that the Commission had promulgated a complex regulatory scheme for the conservation of Texas' oil and gas resources, and that Texas had created a centralized system of judicial review of the Commission's orders, which permitted the Texas courts to "acquire a specialized

knowledge" of the Commission's regulations and the industry. *Id.* at 325-27; *see also id.* at 326 (finding that the Texas courts and the Commission were "working partners ... in the business of creating a regulatory system for the oil industry"). The Court determined that the state courts' review of the Commission's orders was "expeditious and adequate," *id.* at 334, whereas review by the federal courts had caused "[d]elay, misunderstanding of local law, and needless federal conflict with ... State policy," *id.* at 327. The Court concluded that "a sound respect for the independence of state action" justified abstention and dismissal of the federal action. *Id.* at 334.

In *NOPSI*, New Orleans Public Service, Inc. challenged a rate order issued by the New Orleans City Council by filing an action for declaratory and injunctive relief in federal court. The district court dismissed the action, relying, in part, upon *Burford*. *Id.* at 359. After reviewing its decisions in *Burford*, *Alabama Public Service Commission v. Southern Railway*, 341 U.S. 341 (1951), and the "other" cases on which it has relied, this Court "distilled the principle ... referred to as the '*Burford* doctrine.'" *Id.* at 360-61.

According to the Court, "[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Id.* (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 814). The Court stated that "*Burford* is concerned

with protecting complex state administrative processes from undue federal influence, [but] it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *Id.* at 362 (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 816).

The Court found that review of the Council's rate order "would not unduly intrude into the processes of state government or undermine the State's ability to maintain desired uniformity." *Id.* at 363. The Court also determined that, although the case demanded "some level of industry-specific expertise," it did not "demand significant familiarity with, and [would] not disrupt state resolution of, distinctively local regulatory facts or policies." *Id.* at 363-64. Accordingly, *NOPSI* did not implicate the principles underlying *Burford*. *Id.* at 364.

The Fourth Circuit's decision extends the *Burford* doctrine beyond the boundaries outlined in *NOPSI*.[3] Among other things, the Fourth Circuit affirmed the district court's

[3] Notably, several courts of appeals have concluded that *NOPSI* limits a federal court's ability to abstain in cases involving state insolvency or rehabilitation proceedings. *See Fragoso v. Lopez*, 991 F.2d 878, 882-84 (1st Cir. 1993) ("[T]he circuit court cases favoring abstention in insurer insolvency matters are suspect in light of *NOPSI*."); *Univ. of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 271-73 (3d Cir. 1991) ("It is clear that, after *NOPSI*, federal courts should be more wary of extending the scope of *Burford* abstention."); *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1505 (8th Cir. 1992) (stating that *NOPSI* "does not permit a broad view of abstention"). *But see Clark v. Fitzgibbons*, 105 F.3d 1049, 1052 (5th Cir. 1997) (stating that *NOPSI* "has not abrogated the rule favoring abstention in deference to state insurance insolvency or liquidation proceedings").

decision to abstain even though the receivership proceeding was judicial and did not involve an order or regulation issued by a state administrative agency. Indeed, the two cases in which this Court approved abstention under the *Burford* doctrine involved challenges to orders of state administrative agencies. *See Burford*, *supra*; *Alabama Pub. Serv. Comm'n*, *supra*.

Furthermore, the Fourth Circuit's deferential review of the district court's decision, *see First Penn-Pac.*, 304 F.3d at 348, facilitated its extension of *Burford*. The Fourth Circuit found that the district court "reasonably viewed" Maryland's receivership process "to be a matter of 'substantial public concern.'" *See id.* at 349 (citation omitted). A majority of the courts of appeals, however, review *de novo* whether the legal bases for abstention exist before examining whether a decision to abstain was an abuse of discretion. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 775 (2d Cir. 1996).[4]

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[4] In addition to the Second Circuit, the Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits apply *de novo* review to abstention decisions. *See Univ. of Maryland*, 923 F.2d at 269; *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm.*, 283 F.3d 650, 652 (5th Cir. 2002); *United States v. Kentucky*, 252 F.3d 816, 825 (6th Cir.), *cert. denied*, 122 S. Ct. 396 (2001); *Property & Cas. Ins. Ltd. v. Cent. Nat'l Ins. Co. of Omaha*, 936 F.2d 319, 321 (7th Cir. 1991); *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 878 (8th Cir. 2002); *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128, 1132 (9th Cir. 2002); *Roe # 2 v. Ogden*, 253 F.3d 1225, 1232 (10th Cir. 2001); *cf. Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 637 (1st Cir. 1996). The Eleventh Circuit is the only court of appeals other than the Fourth Circuit that applies an abuse of discretion standard to the review of abstention decisions. *See Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000).

The Fourth Circuit's expansive view of the *Burford* abstention doctrine cannot be reconciled with this Court's decisions. *See First Penn-Pac.*, 304 F.3d at 352 (Luttig, J., dissenting) (recognizing that the case presented "[n]either of [the] *sine qua non*" for abstention). This Court should issue a writ of certiorari to consider whether the Fourth Circuit's extension of the *Burford* doctrine is consistent with the doctrine's purposes and scope.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-2218

FIRST PENN-PACIFIC LIFE INSURANCE COMPANY,
Plaintiff-Appellant,

v.

WILLIAM R. EVANS, Chartered; MARYLAND FIRST FINANCIAL SERVICES CORPORATION,
Defendants-Appellees.

MARYLAND SECURITIES COMMISSION,
Amicus Curiae.

Appeal from the United States District Court for the District of Maryland, at Baltimore
Alexander Harvey II, Senior District Judge
(CA-01-680-H)

Argued: May 7, 2002
Decided: September 18, 2002

Before WILKINSON, Chief Judge, and NIEMEYER and LUTTIG, Circuit Judges.

Affirmed by published opinion. Chief Judge WILKINSON wrote the majority opinion, in which Judge NIEMEYER joined. Judge LUTTIG wrote a dissenting opinion.

COUNSEL

ARGUED: Derek Barnet Yarmis, FUNK & BOLTON, P.A., Baltimore, Maryland, for Appellant. Paul Stephen Caiola, GALLAGHER, EVELIUS & JONES, L.L.P., Baltimore, Maryland, for Appellee Maryland First Financial Services Corporation. Lucy Adams Cardwell, Assistant Attorney General, Baltimore, Maryland, for Amicus Curiae. **ON BRIEF**: Lee Ann Lezzer, FUNK & BOLTON, P.A., Baltimore, Maryland, for Appellant. Thomas C. Dame, GALLAGHER, EVELIUS & JONES, L.L.P., Baltimore, Maryland, for Appellee Maryland First Financial Services Corporation. J. Joseph Curran, Jr., Attorney General of Maryland, Katharine M. Weiskittel, Staff Attorney, Baltimore, Maryland, for Amicus Curiae.

OPINION

WILKINSON, Chief Judge:

First Penn-Pacific Life Insurance Company sought rescission of a life insurance policy, alleging fraud. Maryland First Financial Corporation intervened as the receiver for Answer Care, Inc., a viatical settlement company, because the policy was a claimed asset of the receivership estate. The receiver filed a motion to dismiss, arguing that *Burford* abstention was appropriate to avoid interfering with the receivership proceedings pending in state court. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 87L.Ed. 1424, 63 S. Ct. 1098 (1943). The district court agreed and dismissed the case.

Because the district court's ruling was not an abuse of discretion, we affirm.

I.

First Penn-Pacific Life Insurance Company sued William R. Evans, Chartered in federal district court, seeking rescission of a life insurance policy. The insurer issued the policy to Stanley Moore in January 1998, and Moore assigned it to Evans two months later. First Penn-Pacific alleged that in applying for the policy, Moore fraudulently misrepresented material facts regarding his family circumstances, his health, and the amount of other life insurance that he owned. The insurer further claimed that the policy was invalid because it was not purchased to protect a legally insurable interest. First Penn-Pacific asked the district court to declare the policy void *ab initio*.

Evans served as escrow agent for Answer Care, Inc. Answer Care had been engaged in consummating "viatical settlements." It would solicit investors to purchase interests in life insurance policies issued to individual "viators" who were diagnosed as having terminal illnesses after being issued the policies. Evans owned bank accounts holding the funds of Answer Care's investors, and owned the policies purchased by the investors.

Pending in the Circuit Court for Baltimore City is an action brought by the Maryland Securities Commissioner against Answer Care and Mark Massoni, its owner and president. *See Lubin v. Answer Care, Inc.*, Case No. 24-C-00-004710 (Cir. Ct. Balt. City). The Commissioner alleged that Answer Care: (1) sold securities in violation of the Maryland Securities Act, Md. Code Ann., Corps. & Ass'ns, § 11-101 *et seq.*; (2) committed fraud by selling interests in

life insurance policies that were obtained through fraudulent applications, and that were canceled by insurers because of this fraud; and (3) had no independent escrow agent to manage the policies sold to investors. The Commissioner sought an injunction, the appointment of a receiver, restitution, and civil penalties.

The Circuit Court froze Answer Care's assets, enjoined the company from selling interests in life insurance policies, and appointed Maryland First Financial Corporation to be the receiver for Answer Care. The court directed the receiver to manage Answer Care's businesses for the purpose of protecting and distributing its assets. The receiver was authorized to recover assets for investors by filing claims against insiders, recipients of preferential treatment, and those who illegitimately received investor funds.

In addressing the question of the beneficial ownership of the life insurance policies at issue, the Circuit Court appointed counsel to represent the interests of Answer Care's investors. Counsel was directed to argue that the ownership of the policies, and the refunded premium payments for canceled policies, should be apportioned among the investors who had been promised a share of the policies' death benefits. Likewise, the receiver argued below that the instant policy's $ 2,000,000 in death benefits (or its refunded premiums) should go to Answer Care's creditors, and to paying the expenses associated with administering the estate.

After the district court granted its motion to intervene, the receiver filed a motion to dismiss, arguing that *Burford* abstention was necessary to avoid interfering with the receivership proceedings in the Circuit Court. The receiver claimed that continuing this action would undermine the integrity of several Circuit Court orders, and would hinder its

efforts to distribute Answer Care's assets. It further asserted that the state's interests were paramount, that the instant policy was a substantial asset of the receivership estate, and that the state had initiated a comprehensive scheme for administering all of Answer Care's assets.

First Penn-Pacific responded that abstention was inappropriate because *Burford* applied only when a federal case would interfere with proceedings or orders of a state administrative agency. The insurer asserted that the Commissioner's action against Answer Care was merely litigation between private parties, not a proceeding of a state agency. It claimed that the district court was obligated to hear the case because Maryland had yet to set up an administrative scheme directly addressing viatical settlements.

The district court agreed with the receiver that *Burford* abstention was appropriate to avoid interfering with the state receivership proceeding. *See* Brandenburg v. Seidel, 859 F.2d 1179, 1192 n.16 (4th Cir. 1988). It thus dismissed the complaint without prejudice. First Penn-Pacific appeals.

II.

A.

We may not disturb a district court's decision to abstain under *Burford* unless we find an abuse of discretion. *See Pomponio v. Fauquier County Bd. of Supervisors*, 21 F.3d 1319, 1324 (4th Cir. 1994); *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 250-51 (4th Cir. 1993); *Brandenburg*, 859 F.2d at 1195. That standard is a deferential one. A district court ruling may be a permissible exercise of discretion, even if an appellate court suspects that it might have ruled otherwise in the first instance. Thus

mindful of the standard of review, we proceed to the analysis of the trial court's decision.[1]

B.

As the district court recognized, a federal court's exercise of discretion in deciding whether to invoke *Burford* abstention "must reflect principles of federalism and comity." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728, 135 L.Ed. 2d 1, 116 S. Ct. 1712 (1996) (internal quotation omitted). These constitutional commitments require federal courts to "exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford,* 319 U.S. at 318 (internal quotation omitted). Courts should abstain from deciding cases presenting "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or whose adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 361, 105 L.Ed. 2d 298, 109 S. Ct. 2506 (1989) ("*NOPSI*") (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814, 47 L.Ed. 2d 483, 96 S. Ct. 1236 (1976)). Abstention is also "the exception, not the rule." Colorado River, 424 U.S. at 813.

The Supreme Court's decisions "do not provide a formulaic test for determining when dismissal under *Burford*

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[1] To read the dissent, one would think that *Burford* abstention was a "requirement" in this case. *Post* at 10. Our holding is simply that the district court did not abuse its discretion in abstaining here.

is appropriate." *Quackenbush,* 517 U.S. at 727. Nevertheless, the general concern that should inform a federal court's discretion is clear enough:

> Ultimately, what is at stake is a federal court's decision, based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the "independence of state action," *Burford,* 319 U.S., at 334, that the State's interests are paramount and that a dispute would best be adjudicated in a state forum.

517 U.S. at 728.

III.

In view of this governing law, we cannot conclude that the district court abused its discretion in declining to exercise its jurisdiction over this case. As in *Brandenburg*, this dispute implicates an entity placed into receivership by order of a state court. In concluding that *Brandenburg* "presented a classic situation for *Burford* abstention," we relied upon the fact that Maryland had set up a comprehensive scheme for liquidating insolvent state-chartered savings and loan associations, and that rehabilitating the industry was indisputably a matter of substantial state concern. 859 F.2d at 1191. Though Answer Care was not a savings and loan, it nevertheless is subject to a highly regulated state process involving the liquidation of its assets.

The Commissioner is the principal executive officer of the Maryland Division of Securities. She is vested with the authority to enforce the Maryland Securities Act. § 11-201. The Act authorizes the Commissioner to bring an action in

state court whenever any person has violated or is about to violate the Act or its implementing regulations. The Commissioner may, as she did in the Circuit Court here, seek injunctive relief, civil penalties, and the appointment of a receiver or conservator for the defendant or the defendant's assets. *See* § 11-702. The Circuit Court's decisions are appealable. *See* Md. Code Ann., Courts & Judicial Proceedings, § 12-101 et seq.

When the Commissioner asks the state court to appoint a receiver, she typically requests, as she did here, that the receiver be given all of the powers and responsibilities set forth in Title 13 of the Maryland Rules. Under Rule 13-101, the receiver is appointed by the court to administer the debtor's estate. Title 13 further provides that the receiver: (1) shall mail a notice to creditors, Rule 13-202; (2) may settle claims relating to the estate with the court's approval, Rule 13-403; (3) shall file reports with the court, Rule 13-501; and (4) shall make a final distribution to creditors, Rule 13-503.

The district court reasonably viewed this highly regulated state process to be "a matter of substantial public concern." *NOPSI,* 491 U.S. at 361 (quoting Colorado River, 424 U.S. at 814). The receivership proceeding in the Circuit Court resulted from a securities fraud of significant proportions. As stated in the order granting appointment of a receiver, the Commissioner forced Answer Care into receivership "to prevent the risk of further loss of investor funds, to protect the public interest and to avoid the harm that will result from a continuing violation of the Maryland Securities Act." The state has a substantial interest in preventing further harm to the public, and in providing investors with some compensation so that the scam does not leave them completely high and dry.

Allowing this action to continue in federal court would severely complicate the efficient dissolution of Answer Care's estate. We would be inviting litigation in fora all around the country over other Answer Care policies that may come under attack. Sprinkling these disputes all over the place constitutes an inefficient way to handle the significant public problem that Answer Care's fraud has created. The receiver's funding to cover such litigation expenses comes from the estate itself. And as the litigation and administrative costs mount, the size of Answer Care's assets shrinks. If the receiver is forced to defend in fora around the nation, the time may come when the victims of the company's fraud will not be able to obtain their due.

Our dissenting brother does not dispute the district court's judgment that major inefficiencies, inconsistencies, and depletions of the receivership estate would be caused by litigating individual actions at different points around the country. This economic reality informs our view that "the liquidation process in particular is one which would be greatly impeded by the involvement of more than one decisionmaking authority." *Brandenburg,* 859 F.2d at 1191.[2] And it is a critical reason why federal courts have frequently abstained to avoid interfering with state receivership proceedings. *See Clark v. Fitzgibbons*, 105 F.3d 1049, 1051 (5th Cir. 1997) ("Permitting these plaintiffs to proceed in federal court in Texas would start a race to the courthouse in any jurisdiction where claims against ABC might have arisen. The

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[2] To extract from the rather specialized setting of state receivership proceedings the notion that *Burford* abstention would be "required in virtually every diversity case by today's opinion," *see* dissenting opinion, *post* at 10, goes beyond hyperbole.

administrative structure established by Arizona to rehabilitate or liquidate insolvent insurers would swiftly crumble."); *cf. Charleston Area Med. Ctr. v. Blue Cross & Blue Shield Mut. of Ohio*, 6 F.3d 243, 250 n.5 (4th Cir. 1993) ("[A receivership case that implicates a complex state statutory scheme] presents precisely the type of litigation in which federal courts should carefully consider abstaining."). Such cases are legion. *See, e.g., Feige v. Sechrest*, 90 F.3d 846 (3d Cir. 1996); *Wolfson v. Mut. Ben. Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699 (10th Cir. 1988); *Law Enforc. Ins. Co. v. Corcoran*, 807 F.2d 38 (2d Cir. 1986); *Easter v. Am. West Fin.*, 202 F. Supp. 2d 1150 (W.D. Wash. 2002); *Rewerts v. Reliance Ins. Co.*, 170 F. Supp. 2d 847 (C.D. Ill. 2001); *In re Universe Life Ins. Co.*, 35 F. Supp. 2d 1297 (D. Kan. 1999).

Federal courts also have abstained in such situations to allow for the consistent dissolution of the receivership estate. The district court permissibly concluded that continuing this action would be inappropriate because it would infringe upon orders previously entered by the Circuit Court. *See id.* at 1192. The Circuit Court enjoined Answer Care from impairing any assets obtained with funds that came from the sale of viatical settlements. It further ordered the receiver to protect and recover Answer Care's assets through whatever steps were necessary. In addition, the court ordered all parties before it to brief the issue of who had the beneficial ownership of the life insurance policies at issue. And in a scheduling order, the receiver was directed to file in the Circuit Court "any claims it intends to pursue related to the pending receivership" because the court "intends to accept special assignment of all claims related to the receivership."

Further, the Commissioner brought to our attention in her Brief as *Amicus Curiae* that a conflict between the Circuit

Court and district court proceedings has already arisen. First Penn-Pacific argued below that the receiver had no legal interest in the policy in question and thus no right to intervene. The Circuit Court later concluded, however, that the receiver was the beneficial owner of all policies sold through Answer Care. Regardless of the resolution of this issue on appeal, it shows that the present situation is rife with the potential for conflict.

More generally, litigants quite possibly could bring the same claims controlled by the same state's law, and yet come away with different results, as various courts might see things differently. In terms of the money that Answer Care's investors hope to recover, it matters a great deal whether a given policy is valid, in which case they are entitled to the death benefits, or whether it is invalid, in which case they will only obtain the refunded premium payments. Thus, the district court acted within its discretion in abstaining to avoid "disrupting the state's efforts to provide a unified method for . . . liquidation." *Brandenburg*, 859 F.2d at 1191; *see also Quackenbush*, 517 U.S. at 717-18.

Relying upon *NOPSI*, First Penn-Pacific claimed below that *Burford* abstention should be invoked only to avoid interfering with an ongoing state administrative proceeding. However, the Circuit Court proceeding was brought by the Commissioner in her capacity as head of a state administrative agency, and it resulted in orders being issued against the company at her request. Assuming arguendo that *Burford* abstention is limited to cases involving the proceedings and orders of state administrative agencies,[3] the Answer Care

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[3] The Supreme Court in *NOPSI* did discuss *Burford* abstention in the context of state administrative proceedings, but the Court has

receivership case is such a proceeding because it was brought by a state agency. First Penn-Pacific sought to avoid *Burford* in the court below by mischaracterizing the receivership action as a private dispute over a viatical settlement company's conduct. But as the district court found, that action "is in fact a proceeding instituted by a state agency to enforce state securities and insurance laws pertaining to the issuance, assignment and sale of life insurance policies."

Finally, it is relevant that the relief previously obtained by the Commissioner was granted by the Circuit Court pursuant to state law, and that relief is being administered in accordance with the Maryland Securities Act and state receivership procedures. State law also controls the instant dispute over the validity of a policy that may be a substantial asset of the receivership estate. Similarly, Answer Care's business involved the insurance industry, which the states are primarily responsible for regulating. *See* 15 U.S.C. § 1011. Although hardly dispositive in itself, the largely local and highly regulated character of this industry further counsels us to respect the Circuit Court receivership proceeding. *See, e.g.*, *Burford,* 319 U.S. at 318-20, 327-34.

IV.

In sum, the district court's ruling here was not an abuse of discretion. Its judgment is **AFFIRMED**.

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since addressed *Burford* abstention in the absence of a state administrative proceeding. *See Quackenbush,* 517 U.S. at 723-31. Indeed, the *Quackenbush* Court omitted the reference to state administrative proceedings in quoting the relevant passage from *NOPSI*. *See id.* at 726-27.

LUTTIG, Circuit Judge, dissenting:

As I have written previously, I believe that in recent years our Circuit has progressively charted its own course in the area of federal court abstention, a course quite different from that required of us by congressional statute and by Supreme Court precedent. *See Johnson v. Collins Entertainment Co.*, 199 F.3d 710, 730 (1999) (Luttig, J., concurring in judgment) (explaining that the majority, though reaching the correct result, worked a substantive change in the law of abstention). This case, decided by the same panel that decided *Johnson*, highlights well just how far my colleagues have gone in converting what is intended as "an extraordinary and narrow exception" to our duty to decide cases otherwise properly before us, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728, 135 L.Ed. 2d 1, 116 S. Ct. 1712 (1996) (internal citations omitted), into almost a rule of obligatory federal abstention, independent of whether there exists either an imperative or peculiar need for state court adjudication. For, at least on a principled application, *Burford* abstention would be required in virtually every diversity case by today's opinion, a result supported by no authority, not even those in our Circuit, and certainly none of those relied upon by the majority.

In the precedents that are relied upon by my colleagues, the presented issue was one already pending in some department within a comprehensive state regulatory scheme comprised of "a variety of legislative, administrative and judicial mechanisms," *Johnson*, 199 F.3d at 715, that was created in response to something like "as thorny a problem as has challenged the ingenuity and wisdom of legislatures," *Burford v. Sun Oil Co.*, 319 U.S. at 318, 324 (1943) (grants of permits for drilling of oil fields in Texas, where "an additional permit may affect pressure on a well miles away"),

to "a state of public crisis," that necessitated an emergency legislative session, *Brandenburg* (state's savings and loan industry), or to "arguably . . . the most hotly contested issue in [that particular state] in recent years," *Johnson*, 199 F.3d at 715 (video poker). And, in all of these cases, the issue was "imbued with sufficient local character that the state courts ought [have been] accorded comity from the federal courts with respect to its regulation." *Johnson*, 199 F.3d at 731 (Luttig, J., concurring in judgment). Neither of these *sine qua non* for federal abstention exists in the case before us today. Indeed, this is as garden-variety a diversity case as one could imagine, indisputably requiring, under statute and established Supreme Court case law, federal court adjudication.

Betraying the dearth of authority available to support the court's broad-gauged expansion of *Burford*'s limited exception, the majority portrays this case as closely analogous to *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988). The actual facts underlying our decision in *Brandenburg* reveal that that case is anything but support for the majority's conclusion; indeed, if anything, *Brandenburg* is affirmative authority for precisely the opposite conclusion from that reached by the majority. As we explained in *Brandenburg*, there, the Governor of Maryland, in response to a panic that threatened to lead to the collapse of the state's savings and loan industry, literally declared a state of public crisis; issued an executive order limiting withdrawals to $ 1,000 per account per month from all Maryland Savings-Share Insurance Corporation institutions; and called the Maryland General Assembly into an emergency session. The Assembly in turn enacted a package of legislation, establishing "a comprehensive framework for the administration of conservatorship and receivership proceedings for insolvent savings and loan associations." *Brandenburg*, 859 F.2d at 1182. That legislation created a state-operated deposit

insurance fund, the Maryland Deposit Insurance Fund, which had "exclusive and plenary jurisdiction over all claims, actions, and proceedings . . . brought by any person and . . . related to the assets, property, powers, privileges, duties and liabilities" of the savings and loan institution in question. As we observed, that legislation was "designed to deal comprehensively with the crisis in the state's savings and loan industry." *Id.*

By contrast, the receivership here is of the most unexceptional kind. It did not arise out of a public crisis, though Maryland certainly knows how to declare one, and it certainly is not the product of special legislative session. Neither did it originate from a distinct and comprehensive mechanism created to address the problem of viatical settlement fraud that faces the Answer Care receivership. As the majority correctly (though inconsistently with its own conclusion) remarks, this receivership is governed by Title 13 of the Maryland Rules of Court, which applies to virtually all receivership proceedings, *see* Md. R. Ct. 13-102, legislation the like of which is commonplace in every state in the Union. And, unlike the threat represented by the imminent collapse of the entire savings and loan industry, which was addressed by the legislation in *Brandenburg*, viatical settlement fraud, though no doubt a problem, has not prompted any heated public debate at all, much less any of the type which, in turn, gave rise to "the complex administrative system that [the state] had established," in *Burford*, whose very purpose was being threatened by parallel federal litigation. *Compare with Burford,* 319 U.S. at 332 ("The whole cycle of federal-state conflict cannot be permitted to begin again.").

By holding that the receivership we consider in this case is, for purposes of *Burford* abstention, analogous to the one in *Brandenburg*, and hence, that abstention is warranted,

the majority has, as I predicted in *Johnson*, all but completed its transformation of *Burford*'s exception to decision into an exception to abstention, in open departure from our "virtually unflagging obligation . . . to exercise [the] jurisdiction" conferred upon us by Congress, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 821, 47 L.Ed. 2d 483, 96 S. Ct. 1236 (1976). *See Johnson*, 199 F.3d at 730 (Luttig, J., concurring) (noting that the majority was affecting "a substantive change in the law of abstention from a doctrine of exception to a doctrine of rule"). Such is the ineluctable consequence of the elevation of a state's everyday interest in "preventing further harm to the public, and in providing investors with some compensation so that the scam does not leave them completely high and dry" to a "substantial" interest for abstention purposes, *ante* at 7, and of the countenance of abstention on nothing more than the mere (and unidentified) potential for conflict with state regulatory law or policy.

As Congress has required by statute, and the Supreme Court has required by decision, I would require the district court to decide this dispute, which was properly before that court for decision. There is no imperative or peculiar need for state court adjudication. Although it has again fallen on deaf ears, I can only repeat what I said in *Johnson*: "It is not our [duty] either to interpret the [jurisdictional] statute narrowly or to expand our own judicial engraftations because we disagree with the Congress that our doors should be open to such disputes." *Johnson*, 199 F.3d at 729 (Luttig, J., concurring in judgment).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. H-01-680

[Filed September 17, 2001]

FIRST PENN-PACIFIC LIFE INSURANCE COMPANY,
Plaintiff

v.

WILLIAM R. EVANS, CHARTERED and MARYLAND FIRST FINANCIAL SERVICES CORP.,
Defendants.

Alexander Harvey, II, Senior United States District Judge.

MEMORANDUM OPINION

In this civil action, plaintiff First Penn-Pacific Life Insurance Company ("First-Penn Pacific") has here sued defendant William R. Evans, Chartered ("Evans"), seeking rescission of a life insurance policy (the "Policy"). In its Memorandum and Order of June 19, 2001, this Court granted the motion to intervene of Maryland First Financial Corp. ("Maryland First Financial" or "defendant"). Maryland First

Financial has been appointed by the Circuit Court for Baltimore City (the "Circuit Court") to be the receiver of Answer Care, Inc.("Answer Care"), and in its Order of June 19, the Court permitted Maryland First Financial to intervene in this case as the receiver for Answer Care.

Defendant Maryland First Financial has now answered the complaint and has filed a motion to dismiss.[1] In its letter to counsel of August 9, 2001, the Court granted the request of Maryland First Financial for an extension of the time for it to respond to plaintiff's discovery. The Court noted that defendant's motion to dismiss was pending and that, if the motion were granted, the case would be dismissed, and it would not be necessary for Maryland First Financial to respond to discovery. Recently, plaintiff First Penn-Pacific has filed a motion for withdrawal of the Court's letter of August 9, 2000, claiming that it should not be precluded from obtaining discovery before contesting the pending motion to dismiss.

Memoranda and exhibits have been submitted by the parties in support of and in opposition to both pending motions.[2] Following its review of the pleadings, memoranda and exhibits, the Court has determined that no hearing is necessary for a decision on the pending motions. *See* Local Rule 105.6. For the reasons stated herein, the motion to dismiss of Maryland First Financial will be granted, plaintiff's motion for withdrawal of the Court's letter of August 9, 2001

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[1] Defendant Evans has not opposed the pending motion to dismiss of Maryland First Financial, but plaintiff has filed an opposition.

[2] On September 7, 2001, plaintiff filed a motion for leave to file a surreply memorandum.

will be denied, and plaintiff's motion for leave to file a surreply memorandum will also be denied.

I

Facts and Contentions of the Parties

The background facts of this litigation were discussed in some detail in the Court's Memorandum and Order of June 19, 2001 and will not be repeated here. As noted therein, defendant Maryland First Financial has previously been appointed by the Circuit Court for Baltimore City to be the receiver of Answer Care. *Lubin v. Answer Care, Inc.*, Case No. 24-C-00-004710 (Cir. Ct. for Balt. City). That pending case is an action brought by the Securities Commissioner for the State of Maryland (the "Commissioner") against Answer Care and Mark Massoni, its owner and President. The Circuit Court has ordered Maryland First Financial, as receiver, to control, manage and account for the assets and businesses of Answer Care for the purpose of consolidating, liquidating, protecting and distributing its assets. In particular, Maryland First Financial has been authorized and directed by the Circuit Court to recover assets for the benefit of investors in Answer Care by, *inter alia*, filing claims against those who have received preferential treatment, against those who may be Answer Care insiders and against those who have received investor funds in an illegitimate manner.

Relying upon *Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943) and *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), defendant Maryland First Financial argues that this Court should invoke the *Burford*-type abstention doctrine and dismiss this case to avoid interference with the receivership proceedings pending in the

Circuit Court.[3] Defendant asserts that continuation of this action would undermine the integrity of several orders previously entered by the Circuit Court and would hinder the efforts of Maryland First Financial to marshal Answer Care's assets and distribute such assets to depositors and other creditors. It is further argued that the dispute addressed by the pleadings in this case should be adjudicated in a state forum, since the interests of the State of Maryland are paramount to any potential interests of the federal government. In support of its arguments, defendant Maryland First Financial asserts that the insurance policy at issue here is a substantial asset of the receivership estate, and defendant maintains that the State of Maryland has initiated in the Circuit Court a comprehensive scheme for administering all of Answer Care's assets pursuant to the Maryland Securities Act and Title 13 of the Maryland Rules of Procedure.

In opposing the pending motion to dismiss, plaintiff argues that this Court should continue to exercise jurisdiction in this case because *Burford* abstention applies only when a federal case will interfere with proceedings or orders of a state administrative agency. It is asserted that the Commissioner's action against Answer Care in Circuit Court is merely litigation between private parties and is neither a proceeding nor an order of a state administrative agency. According to the plaintiff, this Court has an obligation to

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[3] Defendant First Financial also argues that the abstention doctrine enunciated by the Supreme Court in *Colorado River Water Cons. Dist v. United States*, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976) should be applied here. In view of the Court's determination that the case should be dismissed under Burford-type abstention principles, it is not necessary for the Court to consider whether the *Colorado River Water* "exceptional circumstances" test is also applicable here.

exercise its jurisdiction since the State of Maryland has yet to devise a complex legislative, administrative and regulatory scheme that directly addresses viatical settlements or viatical settlement companies.

II

Applicable Principles of Law

In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717-18, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996), the Supreme Court reiterated that the principle underlying its abstention doctrines is primarily "'the avoidance of needless friction with state policies, whether the policy relates to the enforcement of criminal law, or the administration of a specialized scheme for liquidating embarrassed business enterprises, or the final authority of a state court to interpret doubtful regulatory laws of the state . . . .'" (quoting *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500, 85 L. Ed. 971, 61 S. Ct. 643 (citations omitted)). In applying this general principle, the Supreme Court has recognized three distinct types of abstention whereby a federal court action may be dismissed, namely, the so-called *Burford, Pullman*[4] and *Younger*[5] abstentions.

Burford-type abstention is premised upon the concept of comity, which means that "federal courts should thus 'exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out

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[4] *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941).

[5] *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971).

their domestic policy.'" *Johnson v. Collins Entertainment Co., Inc.*, 199 F.3d 710, 719 (4th Cir. 1999) (quoting *Burford*, 319 U.S. at 318)). As further explained in *Johnson*:

> The federal judiciary should accordingly abstain from deciding cases (1) that present "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" or (2) whose adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." 199 F.3d at 719 (quoting *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 361, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) (internal quotation marks omitted).

In *Johnson*, the Fourth Circuit recognized that *Burford* abstention "safeguards our federal system from the 'delay, misunderstandings of local law, and needless conflict with [a] state policy' that inevitably results from federal judicial intrusions into areas of core state prerogatives." *Johnson*, 199 F.3d at 719 (quoting *Burford*, 319 U.S. at 327).

III

Discussion

(a)

Burford-type Abstention

After considering the parties' arguments, this Court has concluded that the motion to dismiss of defendant Maryland First Financial must be granted. *Burford*-type abstention principles are applicable in this case.

As in *Brandenberg*, this case concerns an entity which has been placed into receivership by order of a state court. As stated by the Fourth Circuit in that case, "the liquidation process in particular is one which would be greatly impeded by the involvement of more than one decision-making authority." 859 F.2d at 1191. In reaching its conclusion that the facts before it presented a classic situation for *Burford* abstention, the Fourth Circuit in *Brandenburg* relied upon two determinations that arose from the fact that the entity forced into receivership was a savings and loan association. *Id.* First, the Court noted that the "Maryland legislature had set up a comprehensive scheme for the rehabilitation and liquidation of insolvent state-charted savings and loan associations," and second, it stated that "the expeditious rehabilitation of the state's savings and loan industry [was] obviously a matter of substantial state concern." *Id.*

Although Answer Care is not a savings and loan association, it is still involved in a highly regulated state process involving the liquidation and distribution of its assets, which is indeed "a matter of substantial public concern." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 361. Federal courts

have frequently invoked the *Burford* doctrine to avoid interference with ongoing state receivership proceedings. *Brandenburg*, 859 F.2d at 1192 n.16 (citing cases). On the record here, this Court concludes that *Burford* abstention is appropriate in this case to avoid "disruption [of] the state's efforts to provide a unified method for liquidation of [Answer Care]." *Id.* at 1191; *see also Quackenbush*, 517 U.S. at 717-18 (explaining that "avoidance of needless friction with state policies" relating to "the administration of a specialized scheme for liquidating embarrassed business enterprises . . . reflect[s] a doctrine of abstention appropriate to our federal system.") (citation omitted)).

As shown by the Circuit Court proceedings, the Commissioner, a state official in charge of a state agency, has forced Answer Care into receivership in order "to prevent the risk of further loss of investor funds, to protect the public interest and to avoid the harm that will result form a continuing violation of the Maryland Securities Act." (Circuit Court Order Granting Appointment of a Receiver at 1). Moreover, the relief previously obtained by the Commissioner, including the appointment of Maryland First Financial as receiver, was granted pursuant to state law and is being administered in accordance with both the Maryland Securities Act and Maryland receivership procedures. As a result, this Court concludes that the State of Maryland has a greater interest than does this Court in adjudicating the dispute in this case involving the validity of a life insurance policy which may be a substantial asset of the receivership estate. The dispute in this case is properly subject to the ongoing receivership proceedings in Circuit Court. *See, e.g., Kent Island Joint Venture v. Smith*, 452 F. Supp. 455, 463 (1978) (The exercise by a federal court of "its jurisdiction in areas of important state domestic policy creates an 'unseemly conflict between two sovereignties, [and] the unnecessary

impairment of state functions . . . .'") (quoting *Martin v. Creasy*, 360 U.S. 219, 224, 3 L. Ed. 2d 1186, 79 S. Ct. 1034 (1959)).

Continuation of this federal action is particularly inappropriate because it will infringe upon certain orders previously entered by the Circuit Court and complicate the efficient dissolution of Answer Care's estate. *See, e.g., Brandenburg*, 859 F.2d at 1192 (finding that plaintiffs' lawsuit was a "collateral attack on the . . . orders issued by the receivership court, and allowing plaintiffs to proceed with it will directly undermine that court's efforts to achieve a fair and equitable distribution of . . . limited assets"). In this case, the Circuit Court has enjoined Answer Care from impairing any assets which like the Policy were obtained with funds that came from the sale of viatical settlements. The Circuit Court has further ordered defendant Maryland First Financial to protect and recover the assets of Answer Care through whatever steps are necessary, including the formal filing of claims. (*See* Appointment Order P 6 at 4, PP 9-10 at 5).

Moreover, the Circuit Court has ordered that all of the parties in the case before it submit legal briefs on the question of who has the beneficial ownership of life insurance polices at issue. Pursuant to an Interim Scheduling Order, Maryland First Financial has been directed to file in the Circuit Court "any claims it intends to pursue related to the pending receivership" because the Circuit Court "intends to accept special assignment of all claims related to the receivership." (Interim Scheduling Order at 2). It is therefore obvious on the record here that "permitting this action to go forward would directly undermine the integrity of several orders issued by the state receivership court," and that, as a result, this Court should apply the *Burford* doctrine and abstain from exercising its jurisdiction in this case. *Brandenburg*. 859 F.2d at 1192.

Plaintiff argues that *Burford*-type abstention should be used only when there exists a possibility of interference with an ongoing state administrative proceeding. There is no merit to this argument, which is based upon *New Orleans Pub. Serv.* In that case, the Supreme Court discussed *Burford* abstention in the context of a federal suit arising as a result of several different decisions which were made by the Council of the City of New Orleans and which were characterized by the Supreme Court as "proceedings or orders of [a] state administrative agency." 491 U.S. at 361. Subsequent to *New Orleans Pub. Serv.*, both the Supreme Court and the Fourth Circuit have applied *Burford* abstention principles in the absence of any underlying state administrative proceeding. *See Quackenbush*, 517 U.S. 706, 135 L. Ed. 2d 1, 116 S. Ct. 1712; *Johnson*, 199 F.3d 710. In fact, oft-quoted language from the *New Orleans Pub. Serv.* opinion is actually taken from *Colorado River*, in which there was no ongoing state administrative proceeding.[6] Moreover, the Commissioner, who is the head of a state administrative agency, has instituted a proceeding against Answer Care in Circuit Court, as a result

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[6] *See New Orleans Pub. Serv.*, 491 U.S. at 361:

> [A] federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." quoting *Colorado River*, 424 U.S. at 814.

of which orders have been issued against Answer Care at the Commissioner's request.

Plaintiff's reliance upon *Finkielstain v. Seidel*, 692 F. Supp. 1497, 1508 (S.D.N.Y. 1988) is likewise misplaced. In that case, the claims in question were "subject to the *exclusive* jurisdiction of the federal courts . . . [and] abstention in [such] circumstances would [have] allowed Maryland to overcome federal law or policy merely by entering an order of receivership." (Emphasis in original). In this case, there is no exclusive federal jurisdiction over the dispute at issue, and there is no possibility that federal law will be defeated or circumvented through continuation of the receivership action in Circuit Court. Similarly, *Phillips v. Solomon Health Services, LLC*, 2000 U.S. Dist. LEXIS 20130, 2000 WL 306450 (D. Conn. 2000) does not support plaintiff's position. That case is distinguishable because this suit involves the validity of an insurance policy, a matter which is primarily a matter of state law, while in Phillips the subject matter of the litigation was "essentially a contractual dispute," which is "not an area of exclusive state concern." *Id.* at *5; *see also Finkielstain v. Seidel*, 692 F. Supp. at 1507-08 ("*Burford* abstention . . . is justified only where the issues sought to be adjudicated in federal court [are] largely ones of state law.")

As plaintiff has acknowledged, the courts and Congress have "declared that state regulation of the business of insurance is in the public interest and shall be subject to state laws and regulations." (Pl.'s Mem. of Law in Opp. at 12 (citing *Lac D'Amiante Du Quebec, LTEE v. American Home Ins. Co.*, 864 F.2d 1033, 1038-39 (3rd Cir. 1988)). Here, the disposition of plaintiff's claims will be entirely dependent upon application of state insurance statutes and state insurance law since the relief sought here is the rescission of an insurance contract. Indeed, a large part of plaintiff's

opposition memorandum is devoted to a discussion of which state's insurance laws should be applied by the Court to determine if the Policy at issue is valid.

In spite of abundant authority indicating that *Burford*-type abstention is clearly applicable in this case, plaintiff attempts to avoid application of the *Burford* doctrine by mischaracterizing the receivership action in the Circuit Court as a private dispute over the conduct of a viatical settlement company. But the receivership action in question is in fact a proceeding instituted by a state agency to enforce state securities and insurance laws pertaining to the issuance, assignment and sale of life insurance policies. Although this Court in exercising its diversity jurisdiction may have the authority to decide the issues of insurance law presented in this case, "there is real value to allowing the states the first crack at deciding issues so pertinent to their own self-governance." *Johnson*, 199 F.3d at 721. Accordingly, this Court is satisfied that *Burford* abstention is appropriate here because "conflicts in the interpretation of state law . . . are almost certain to result" from the intervention of this Court into this matter. *Burford*, 319 U.S. at 334.

Rather than retaining jurisdiction pending determination of the issues by the state court, this Court concludes that *Burford*-type abstention requires dismissal of this particular action altogether. *See American Cas. Co. v. Community Sav. & Loan*, 635 F. Supp. 539, 542 n.3 (D. Md. 1986) (citing Wright, Miller & Cooper, Jurisdiction § 4245 (1978)). The usual procedure in a case involving application of the *Burford* doctrine is dismissal of the action. *Kent Island*, 452 F. Supp. at 464. Plaintiff still has an effective state venue whereby it would be entitled to obtain the relief sought by it in this case. The Court's disposition here in no way prejudices the plaintiff's right to refile its claims against

the defendants in the state court proceeding. *Bradenburg*, 859 F.2d at 1195 n.18. Dismissal of this action will avoid the uncertainty, delay and interference with state policy which would be caused if jurisdiction were retained and if there would be piecemeal adjudication of the issues. *See Kent Island*, 452 F. Supp. at 464.

(b)

Other Contentions

In further support of its pending motion, defendant Maryland First Financial has argued that dismissal of this action is appropriate because plaintiff failed to file the case within the applicable two year contestability period and because defendant Evans and Answer Care do not have an insurable interest in the life of the insured and are required to have such an interest to be able to maintain this action. It has further been argued that Count II of the complaint should be dismissed because it is barred by Maryland's three-year statute of limitations. Plaintiff disputes all of these contentions and has recently filed a motion for leave to file a surreply addressing the issues in question.

Since the Court has concluded that *Burford* abstention principles require dismissal of this action, the Court will not address any of these other contentions. Defendant Maryland First Financial may present these arguments in the Circuit Court receivership proceedings. It will be for that Court to determine whether plaintiff's claims are subject to dismissal on the grounds asserted.

The motion of plaintiff First Penn-Pacific for leave to file a surreply will be denied. Since this Court will not be considering the additional contentions advanced by Maryland

First Financial, there is no need for plaintiff to submit a further surreply memorandum.

(c)

Plaintiff's Motion for Withdrawal

As noted, plaintiff has filed a motion asking this Court to withdraw its ruling of April 9, 2001 which directed that, until further Order of Court, defendant Maryland First Financial is not required to respond to plaintiff's interrogatories and requests for the production of documents. According to plaintiff, the motion to dismiss of Maryland First Financial is actually a motion for summary judgment since various evidentiary materials have been submitted to the Court in support of that motion.

Plaintiff's motion for withdrawal will be denied. The pending motion is clearly a motion to dismiss and not a motion for summary judgment. It is not necessary for the Court, in ruling on defendant's pending motion to dismiss, to rely on evidentiary materials which are a part of the record here. Although, pursuant to Rule 12(b)(6), F.R.Civ.P., the Court may treat a motion to dismiss as one for summary judgment under Rule 56, this Court has not done so in this case. In granting the motion of Maryland First Financial, judgment in favor of that defendant has not been entered. Rather, the case is being dismissed without prejudice to the right of the parties to present the issues raised in this case to the Circuit Court in the receivership proceedings.

Plaintiff has argued that it should be entitled to engage in discovery to determine whether Maryland First Financial has any interest in the Policy. But defendant has alleged and has pointed to evidence in the record indicating that the

insurance policy at issue here is an asset of the receivership estate. In its Memorandum and Order of June 19, 2001, this Court relied on this assertion to permit Maryland First Financial to intervene in this case as the receiver for Answer Care. There has been no final ruling on the issue. Plaintiff would be entitled to claim in the Circuit Court proceedings that the Policy at issue is not an asset of the receivership estate.

Plaintiff contends that the discovery which it has requested is necessary for it to properly respond to the pending motion. The Court must disagree. The discovery sought by the plaintiff in its interrogatories and request for documents is not material to the issue of the applicability of *Burford*-type abstention to this case. There is accordingly no merit to plaintiff's motion for withdrawal.

IV

Conclusion

For all the reasons stated, the motion to dismiss of defendant Maryland First Financial will be granted. Plaintiff's motion for withdrawal of the Court's letter of August 9, 2001 will be denied, and plaintiff's motion for leave to file a surreply will also be denied. An appropriate Order will be entered by the Court.

/s/ Alexander Harvey, II
Senior United States District Judge

DATED: September 17, 2001

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. H-01-680

[Filed September 17, 2001]

FIRST PENN-PACIFIC LIFE INSURANCE COMPANY,
Plaintiff

v.

WILLIAM R. EVANS, CHARTERED and MARYLAND FIRST FINANCIAL SERVICES CORP.,
Defendants.

ORDER

For the reasons stated in the Court's Memorandum Opinion of today, it is this 17th day of September, 2001 by the United States District Court for the District of Maryland

ORDERED:

1. That the motion to dismiss of defendant Maryland First Financial Services Corp. is hereby granted;

2. That plaintiff's motion for withdrawal of the Court's letter of August 9, 2001 is hereby denied;

3. That plaintiff's motion for leave to file a surreply is hereby denied; and

4. That the complaint is hereby dismissed without prejudice.

/s/ Alexander Harvey II
Senior United States District Judge

FEB 27 2003

No. 02-953

IN THE

Supreme Court of the United States

FIRST PENN-PACIFIC LIFE INSURANCE COMPANY,

Petitioner,

v.

WILLIAM R. EVANS, Chartered, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MARYLAND FIRST FINANCIAL SERVICES CORP., COURT-APPOINTED RECEIVER FOR ANSWER CARE, INC.

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STATEMENT PURSUANT TO RULE 29.6

Respondent Maryland First Financial Services Corp. has no parent corporation. No publicly held company owns 10% or more of the corporation's stock.

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Respondent, Maryland First Financial Services Corp., a Maryland corporation, the court-appointed receiver for Answer Care, Inc. ("the Receiver" or "Respondent"), by its undersigned counsel, files this Brief in Opposition to First Penn-Pacific Life Insurance Company's ("Petitioner" or "First Penn") Petition for Writ of Certiorari.

STATEMENT OF THE CASE

I. Factual Background

Answer Care is a Maryland corporation that was engaged in the business of promoting to third parties sales of interests in life insurance policies known as "viatical settlements." App. 3a. Answer Care would solicit investors to purchase interests in life insurance policies issued to insureds, known as "viators," who were terminally ill. App. 3a. Answer Care enlisted attorney escrow agents such as William R. Evans to ensure that investor funds were properly distributed, insurance premiums were paid, and life insurance proceeds were collected and distributed to investors upon a viator's death. App. 3a.

In September of 2000, the Maryland Securities Commissioner (the "Commissioner"), who heads the division of the Maryland agency that is responsible for enforcing the Maryland Securities Act, Title 11 of the Corporations and Associations Article of the Maryland Annotated Code (the "Act"), brought an action against Answer Care and its former President, Mark Massoni, in the Circuit Court for Baltimore City (the "receivership court"), Case No. 24-C-00-004710. App. 3a. That action involves securities fraud allegedly committed by Answer Care and its former agents and principals. App. 3a-4a.

Upon motion of the Commissioner, the receivership court placed Answer Care into receivership "to prevent the risk of further loss of investor funds, to protect the public interest and to avoid the harm that will result from a continuing violation of the Maryland Securities Act." App. 8a. The receivership court ordered the Receiver to control, manage, and account for the assets and businesses of Answer Care for the purpose of consolidating, protecting, and distributing its assets. App. 19a. In particular, the receivership court ordered the Receiver to recover assets for the benefit of Answer Care's investors through whatever steps are necessary, including the filing of claims. App. 25a.

Pursuant to the Commissioner's request, the receivership court vested the Receiver with all powers and obligations enumerated in Title 13 of the Maryland Rules. App. 8a. As noted by the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"), Title 13 provides a "highly regulated state process" for state receiverships. App. 8a. Specifically, Title 13 provides that the Receiver: (1) shall mail a notice to creditors, Rule 13-202; (2) may settle claims relating to the estate with the court's approval, Rule 13-403; (3) shall file reports with the court, Rule 13-501; and (4) shall make a final distribution to creditors, Rule 13-503.

Among the policies viaticated through Answer Care is the policy at issue in this litigation, which First Penn issued in January 1998 on the life of Stanley R. Moore. App. 3a. Moore assigned the policy to Evans two months later. App. 3a. The policy has a death benefit of $2,000,000. App. 3a-4a.

II. Procedural Background

Petitioner filed this declaratory judgment action seeking to rescind the policy on the grounds that it was supposedly procured by fraud. App. 2a. Respondent intervened as the Receiver for Answer Care. App. 2a. Respondent filed a motion to dismiss arguing, *inter alia*, that *Burford* abstention was appropriate to avoid interfering with the ongoing receivership proceedings in state court. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); App. 2a. The district court agreed and dismissed the action. App. 2a. The Fourth Circuit affirmed and Petitioner's Motion for Rehearing *En Banc* was denied as untimely. Petitioner then sought review in this Court. App. 3a.

REASONS FOR DENYING THE WRIT

The sole question presented by this Petition is whether the Fourth Circuit's application of the *Burford* abstention doctrine is consistent with the purposes and scope of the doctrine. Petitioner contends that the Fourth Circuit's decision "charts a new course" by extending the *Burford* doctrine "beyond the boundaries" outlined in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"). Pet. at 5-10. Specifically, Petitioner argues that *NOPSI*: (1) does not permit abstention from matters that are "judicial" and do not "involve an order or regulation issued by a state administrative agency"; and (2) limits a federal court's ability to abstain to avoid interference with state insolvency proceedings. Pet. at 8-9. Finally, Petitioner contends that, in applying an abuse of discretion standard of review, the Fourth Circuit broke from many other circuit courts that review abstention decisions *de novo*. Pet. at 9 n.4.

Petitioner's arguments have no merit. In fact, the Fourth Circuit's ruling does not conflict with this Court's abstention precedent or the many abstention decisions issued by circuit courts on facts similar to those present here. Further, there is no split in the circuits regarding the proper standard of review that applies when reviewing a decision to abstain on *Burford* grounds.

This Court should deny the Writ because the Fourth Circuit's decision is not "unprecedented," as Petitioner claims. Rather, the decision is supported by ample Supreme Court and circuit court caselaw holding abstention to be proper in order to avoid interference with ongoing state receivership proceedings. As the district court noted, "abundant authority indicat[es] that *Burford*-type abstention is *clearly* applicable in this case." App. 28a (emphasis added).

I.

THE FOURTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *BURFORD* AND ITS PROGENY

The Fourth Circuit properly affirmed the district court's discretionary decision to abstain. *See* App. 7a-12a. *Burford* abstention is based on the principle that federal courts should "exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford*, 319 U.S. at 318 (internal quotation marks omitted).

Under *Burford*, the federal judiciary should abstain from deciding cases: (1) that present "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of the case then at

bar"; *or* (2) whose adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *NOPSI*, 491 U.S. at 361 (internal quotation marks omitted). *Burford* abstention is appropriate when a federal court decides, "based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the independence of state action, that the State's interests are paramount and that a dispute would best be adjudicated in a state forum." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (internal citations and quotations omitted).

Applying *Burford* and its progeny, the district court conducted a careful examination of the facts and circumstances of this action, and properly exercised its discretion in ruling that this action should proceed in the receivership court, not in the federal district court. Specifically, the district court concluded that: (1) the State of Maryland has a substantial interest in the case as reflected by the Commissioner's initiation of the State receivership action to redress alleged securities fraud; (2) the receivership court has assumed comprehensive jurisdiction over Answer Care and any claims related to Answer Care; (3) this substantial state interest clearly outweighs any interest of the federal court system; and (4) the continuation of a separate federal action addressing one of many insurance policies in the receivership would likely disrupt the administration of the State receivership action, by undermining orders issued by the receivership court and by creating conflicts in the interpretation of state law. App. 23a-29a.

A. Under *NOPSI*, *Burford* Abstention Is Proper To Avoid Interfering with an Ongoing State Receivership Proceeding Initiated by the Head of a State Administrative Agency

Petitioner has a narrow view of *Burford* abstention. Purportedly relying on *NOPSI*, Petitioner argues that *Burford* abstention may only be invoked to avoid interfering with an order or regulation issued by a state administrative agency. Pet. at 8-9. Because the Commissioner did not herself issue the order establishing the receivership, but rather initiated the receivership by filing an action in state court, Petitioner suggests that *Burford* abstention does not apply and that the Fourth Circuit's decision "extends the *Burford* doctrine beyond the boundaries outlined in *NOPSI*." *Id.* This argument was properly rejected below and does not justify granting the writ, for three reasons.

First and most obvious, as noted by the Fourth Circuit, the state court receivership proceeding was initiated "by the Commissioner in her capacity as head of a state administrative agency, and it resulted in orders being issued against the company at her request." App. 11a. Thus, even if *Burford* abstention were limited to proceedings and orders of state administrative agencies, the Commissioner's action against Answer Care is precisely such a proceeding because it was brought by a state administrative agency.

Second, *Burford* abstention is not limited to administrative proceedings. While this Court in *NOPSI* discussed *Burford* abstention in the context of a state administrative proceeding and thus included language relating the *Burford* elements to "proceedings or orders of state administrative agencies," this Court's more recent

statements concerning *Burford* demonstrate that there is no state administrative proceeding requirement. In *Quackenbush v. Allstate Ins. Co.*, *supra*, this Court omitted the reference to state administrative proceedings in quoting the passage from *NOPSI* setting forth the test for *Burford* abstention. The *Quackenbush* court described the *Burford* test as follows:

> *Burford* allows a federal court to dismiss a case only if it presents "'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,'" or if its adjudication in a federal forum "'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'"

517 U.S. at 726-27 (quoting *NOPSI*, 491 U.S. at 361).[1]

In fact, the relevant state proceeding in *Quackenbush* was pending in a state court rather than in an administrative agency. *Quackenbush* concerned an action in state court by the California Insurance Commissioner against Allstate seeking damages for Allstate's alleged breach of its reinsurance agreements. 517 U.S. at 709. When Allstate removed the case to federal court and sought an order compelling arbitration, the Commissioner moved to remand to state court under *Burford*. *Id.* The district court granted the motion and dismissed the complaint, but the Ninth Circuit reversed. *Id.*

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1. Significantly, the *NOPSI* court took this oft-quoted language from *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976), in which there was no state administrative proceeding.

This Court affirmed the Ninth Circuit's decision rejecting *Burford* abstention, holding that "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary," and that "[b]ecause this was a damages action, . . . the District Court's remand order was an unwarranted application of the *Burford* doctrine." *Id.* at 731.

In so holding, however, this Court did not even suggest that *Burford* abstention was unavailable because the state proceedings were pending before a court rather than an administrative agency. To the contrary, the *Quackenbush* court indicated that *Burford* abstention would have been proper if the plaintiff had sought an equitable remedy rather than damages. Further, the Court added that "in the interest of avoiding inconsistent adjudications . . . , the District Court might have been justified [under *Burford*] in entering a stay to await the outcome of the state court litigation." *Id.* The present case fits squarely within the parameters for *Burford* abstention described in *Quackenbush*, because the relief sought by First Penn is equitable in nature and would affect the assets of the receivership.

Third, several post-*NOPSI* circuit court decisions have applied *Burford* abstention in the absence of a state administrative proceeding. *See, e.g., Gonzalez v. Media Elements, Inc.*, 946 F.2d 157, 157 (1st Cir. 1991) (determining to abstain in order to promote the orderly, efficient, and consistent adjudication of the liquidation of an insurer's insolvency proceedings in state court); *Feige v. Sechrest*, 90 F.3d 846, 848 (3d Cir. 1996) (noting that state court has jurisdiction over all claims arising under Pennsylvania Insurance Act of 1921); *Martin Ins. Agency, Inc. v. Prudential*

Reinsurance Co., 910 F.2d 249, 254 (5th Cir. 1990) ("A federal court should abstain from exercising jurisdiction where to do so would interfere with a specialized, unified state court system of adjudication designed to avoid inconsistent adjudication of claims arising from a comprehensive, detailed, and complex regulatory scheme in a subject area involving state law."); *Barnhardt Marine Ins., Inc. v. New England Int'l Sur. of Am., Inc.*, 961 F.2d 529, 531-32 n.4 (5th Cir. 1992) (noting near unanimity among the circuit courts that *Burford* abstention is appropriate in cases related to a state's administration of an insolvent insurer); *Clark v. Fitzgibbons*, 105 F.3d 1049, 1050-51 (5th Cir. 1997) (noting that state court placed insurer in receivership and asserted exclusive jurisdiction over its property and assets); *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 427 (7th Cir. 1990) ("For a federal court to award a judgment . . . , it would have to invade the province of the state rehabilitation court. . . ."); *Wolfson v. Mut. Ben. Life Ins. Co.*, 51 F.3d 141, 144-46 (8th Cir. 1995) (abstaining from deciding claim for insurance benefits under ERISA because insurer was the subject of a pending insolvency proceeding in state court).

B. *NOPSI* Does Not Preclude *Burford* Abstention Where Adjudication in the Federal Forum Might Interfere With State Insolvency or Receivership Proceedings

In a footnote, Petitioner claims that *NOPSI* abrogated the rule favoring abstention in deference to state insolvency or rehabilitation proceedings. Pet. at 8 n.3. Petitioner is incorrect. Indeed, since this Court decided *NOPSI* in 1989, circuit courts have frequently abstained from deciding federal actions whose adjudication could interfere with state insolvency or receivership proceedings. *See, e.g.*, *Clark*, 105

F.3d at 1053 (affirming district court decision to abstain); *Barnhardt*, 961 F.2d at 532 (same); *Martin*, 910 F.2d at 255 (same); *Hartford*, 913 F.2d at 427 (same); *Feige*, 90 F.3d at 851 (same); *Wolfson*, 51 F.3d at 147 (same); *Gonzalez*, 946 F.2d at 157 (granting motion to dismiss on abstention grounds).

In support of its position, Petitioner cites three cases – *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993), *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991), and *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497 (8th Cir. 1992). These cases, however, do not support the broad proposition for which they are cited. Significantly, these cases all predate *Quackenbush*, in which this Court recognized that where, as here, the relief sought is "equitable or otherwise discretionary," federal courts have the power to dismiss cases based on abstention principles. 517 U.S. at 731. Both *University of Maryland* and *Fragoso* involved claims for damages. *See University of Maryland*, 923 F.2d at 271; *Fragoso*, 991 F.2d at 882. Moreover, these cases are otherwise distinguishable from the present case.

In *University of Maryland*, the Third Circuit examined the appropriate conditions for *Burford* abstention when deciding an action for damages against an insolvent insurance company's independent auditor. 923 F.2d at 267. The defendant auditor, Peat Marwick, and the intervenor Commissioner both filed motions to dismiss the federal action. *Id.* The district court granted the Commissioner's motion to dismiss on *Burford* abstention grounds. *Id.* The Third Circuit reversed, holding that abstention was not justified in such a case, because "Pennsylvania's regulatory scheme governing insurance company insolvencies is not concerned with protecting auditors," *id.* at 272, and thus Peat

Marwick's "connection to the state regulatory mechanism (governing insolvency proceedings) that *Burford* abstention is designed to protect [was] simply too attenuated." *Id.* at 271. The Third Circuit explained, however, that "Burford abstention may be ordered in insurer insolvency cases . . . when one of the parties to the action in which the federal court abstains is the insolvent insurer or its *receiver*, trustee, officers, and the like." *Id.* (emphasis added). The Third Circuit specifically found that abstention is appropriate when the insolvent entity's receiver is a party to the federal litigation. Thus, *University of Maryland* actually supports the district court's decision to abstain in this case since Respondent is Answer Care's receiver in the state court proceeding.

Fragoso involved a state liquidation proceeding that was initiated *after* a final judgment had been rendered in a federal court action and *after* the appeal had been assigned for hearing. *See Fragoso*, 991 F.2d at 880. Noting that "the more embryonic a case, the more significant an interference with the state framework for handling insurance liquidation if the federal tribunal does not yield," the First Circuit determined that the procedural posture of Fragoso's case made it "a very weak candidate for abstention." *Id.* at 885. The *Fragoso* court found that abstaining after entry of judgment would not serve the interests of comity and judicial efficiency. *Id.* Unlike the plaintiff in *Fragoso*, Petitioner here brought a claim for declaratory relief nearly six months *after* the Commissioner placed Answer Care into receivership. Moreover, this action was dismissed at the start of the federal lawsuit, before any discovery had taken place. Thus, unlike in *Fragoso*, notions of "comity and judicial efficiency" are served by abstention in this case.

In *Melahn*, the Sixth Circuit conducted a fact-specific *Burford* abstention analysis and concluded that the district court "abused its discretion by abstaining in this case *under the circumstances*." 965 F.2d at 1507 (emphasis added). Specifically, the *Melahn* court concluded that the receiver had elected to assert the claim outside the insolvency proceedings by filing a similar action against the same defendant in another state's court, and that adjudication of that claim in federal court would neither interfere with the receiver's control of the insolvent nor frustrate in any way the state's interests in the insolvency proceedings. *Id.* at 1506-07.

Melahn does not support Petitioner's claim that the Fourth Circuit's decision in the present case extends *Burford* beyond the boundaries described in *NOPSI*. First, the Eighth Circuit decided *Melahn* based on a fact-specific analysis and not based on a generalized conclusion that *Burford* abstention is inapplicable to state insolvency proceedings. Thus, this case does not create a split among the circuits concerning when *Burford* abstention is warranted in deference to state insolvency proceedings

Second, the facts in *Melahn* are distinguishable from the facts here. Unlike *Melahn*, here the Fourth Circuit correctly concluded that federal adjudication of First Penn's claims would likely disrupt the state receivership proceedings and lead to inconsistent rulings. App. 9a-11a. Further, the Eighth Circuit has limited *Melahn* to its facts. Three years after *Melahn*, the Eighth Circuit decided *Wolfson v. Mutual Ben. Life Ins. Co.*, in which it again considered whether abstention was warranted under *Burford* in deference to state rehabilitation proceedings. This time, the Eighth Circuit affirmed the district court's decision to abstain to "avoid[]

piecemeal litigation, conserve[] judicial resources, and further[] the cost-minimizing purposes of rehabilitation by allowing the state court to determine as well as satisfy [the] claim." *See* 51 F.3d at 146-47. In so holding, the *Wolfson* court distinguished *Melahn*. The court observed that "[t]he abstention issue often turns on the relative importance to the state court insolvency proceeding of litigating a particular claim in that proceeding." *Id.* at 145. The *Wolfson* decision further limits the precedential value of *Melahn*.

II.

THERE IS NO SPLIT AMONG THE CIRCUITS REGARDING THE APPROPRIATE STANDARD OF REVIEW IN A CASE INVOLVING *BURFORD* ABSTENTION

Petitioner argues that there is a split among the circuits regarding the appropriate standard of review in *Burford* abstention cases. Pet. at 9. According to Petitioner, the Fourth and Eleventh Circuits are the only circuits that apply an abuse of discretion standard in reviewing a district court's decision to abstain under *Burford*. Pet. at 9 n.4. This assertion is incorrect.

The circuit courts are not split on the appropriate standard of review to apply in reviewing a *Burford* abstention decision – all circuits apply an abuse of discretion standard.[2] Indeed,

2. *See, e.g., Tribune Co. v. Abiola*, 66 F.3d 12, 13 (2d Cir. 1995) (noting that "the district court in this case did not abuse its discretion when it declined to abstain on *Burford* grounds"); *Felmeister v. Office of Attorney Ethics, Div. of New Jersey Admin.*, 856 F.2d 529, 535 (3d Cir. 1988) ("Our scope of review of a district court's decision to

(Cont'd)

Burford itself requires this result. In *Burford*, this Court described a district court's broad discretion when determining whether to abstain in a particular case:

> Although a federal equity court does have jurisdiction of a particular proceeding, it may, *in its sound discretion*, whether its jurisdiction is invoked on the grounds of diversity or citizenship or otherwise, "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest"; for it "is in the public interest that federal courts of equity should exercise their *discretionary power* with proper regard for the rightful independence of state

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(Cont'd)

abstain under *Burford* is abuse of discretion."); *Webb. v. B.C. Rogers Poultry, Inc.*, 174 F.3d 697, 701 (5th Cir. 1999) ("We review an abstention for abuse of discretion."), *cert. denied*, 528 U.S. 964 (1999); *Caudill v. Eubanks Farms, Inc.*, 301 F.3d 658, 660 (6th Cir. 2002) ("This Court reviews a district court's decision to abstain for abuse of discretion."); *International College of Surgeons v. City of Chicago*, 153 F.3d 356, 360 (7th Cir. 1998) ("We review a district court's decision whether to abstain from exercising jurisdiction for an abuse of discretion."); *Melahn*, 965 F.2d at 1507 ("We are persuaded that the district court abused its discretion by abstaining in this case under the circumstances."); *Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 376 (9th Cir. 1982) ("This court will reverse a trial court ruling on abstention only if there was an abuse of discretion."); *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1377 (10th Cir. 1989) ("We review under an abuse of discretion standard the district court's decision whether to apply primary jurisdiction and refer this case to the Commission."); *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000) ("[A] district court's decision to abstain will only be reversed upon a showing of abuse of discretion.") (internal quotations omitted).

> governments in carrying out their domestic policy."

319 U.S. at 318 (emphasis added) (quoting *United States v. Dern*, 289 U.S. 252, 360 (1933) and *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935)). In the decision below, the Fourth Circuit correctly applied this standard of review and found that the district court had fairly exercised its discretion. App. 12a.

Petitioner cites cases in which circuit courts have articulated a *de novo* review of whether the legal requirements for abstention exist, followed by a discretionary review of the abstention decision itself. Petitioner contends that such cases "apply *de novo* review to abstention decisions." Pet. at 9 n.4; *see, e.g.*, *Cedar Rapids Cellular Tel. v. Miller*, 280 F.3d 874, 878 (8th Cir. 2002) ("A district court's decision to abstain is reviewed for abuse of discretion, with the underlying legal decisions receiving plenary review"); *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128, 1132 (9th Cir. 2002) ("We review *de novo* whether the requirements for abstention have been met. When the requirements for abstention are present, we review the district court's decision to abstain for an abuse of discretion.").

This argument is misplaced. The standard of review described in these cases is identical to the Fourth Circuit's. Under the Fourth Circuit's articulation of the standard of review, it would certainly be an abuse of discretion for a district court to abstain in a case in which the legal requirements for abstention were absent. The present case was not such a case. In affirming the district court's decision, the Fourth Circuit correctly held that the necessary legal requirements for abstention were present and that, in abstaining, the district court reasonably exercised its discretion.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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